IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1339

THOMAS L. CLANON, Petitioner

vs.

EARL B. GIBSON, Respondent.

GEORGE SUMNER, Petitioner,

vs.

LAWRENCE JUSTICE, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents Earl B. Gibson and Lawrence Justice respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 633 F.2d 851.

JURISDICTION

Respondents accept petitioners' statement of jurisdiction in this case.

QUESTION PRESENTED

1. Whether this Court should grant certiorari to review a factual finding by a federal court of appeal assessing the prejudicial impact of a concededly constitutional error, when that determination is fundamentally grounded upon the explicit factual finding of the state criminal trial judge, unchallenged by the reviewing state courts, that in light of the prosecution evidence the error could not be considered harmless

beyond a reasonable doubt.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment XIV, Section 1: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. ..."

The United States Constitution, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; ... and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Respondents accept petitioners' description of the procedural history of the case. Respondents offer the following statement of facts relevant to the constitutional issue raised in this case, which is taken from the text of the opinion of the Court of Appeals for the Ninth Circuit, which appears as Appendix A to the Petition for Writ of Certiorari:

> On July 21, 1971, Leo Davis, an unarmed guard at the San Quentin prison hospital, was stabbed to death. The state's case linking Gibson and Justice to the crime was based principally upon the testimony of three witnesses and the introduction of certain physical evidence.
>
> The state's chief witness was Herman Johnson who testified that he was an eyewitness to the killing. On July 19, 1971, Johnson claimed he was stabbed in the neck by Gibson and Justice shortly after he had been transferred to San Quentin from Soledad. The attack was allegedly provoked by Johnson's willingness to give a statement implicating other inmates in a crime at Soledad. After the attack, Johnson was placed in a room on the second floor. Davis was stationed in the hallway outside his door.
>
> According to Johnson, at around noon on July 21 he

caught a glimpse of Gibson through a window in the door to his room and heard scuffling. He testified that upon going to the door he was able to see Gibson and Justice stab Davis while a third man held him.

The defendants impeached Johnson's testimony with the testimony of other inmates who stated that they had witnessed the July 19 attack on Johnson, and Gibson and Justice were not among the attackers. The defense implied that there was a possibility that Johnson's testimony was biased because a decision on a parole violation committed by Johnson was allegedly held in abeyance until after his testimony at the trial. The defense also introduced evidence indicating that Johnson had a poor reputation for veracity.

Johnson's eyewitness account was corroborated by two other prosecution witnesses. Another inmate with the last name of Johnson, Charles Johnson, testified that he had seen Gibson, Justice and a third man in a shower room on the second floor of the hospital within a short time of when the murder occurred.

There was also testimony from Ivan Kranzelic who shared a hospital ward on the fourth floor with Gibson. Gibson had gained admittance to the hospital after allegedly suffering an injury in football practice the day before the murder. Kranzelic testified that on the morning of July 21 he had seen an inmate give a prison-made knife to Gibson, who in turn gave it to Justice. Kranzelic overheard Gibson make various statements such as they would have to do "it" that day. Around noon Gibson, Justice, and a third inmate left the ward and returned about twenty minutes later. Kranzelic testified that Justice's hand was bleeding when he returned and, as he sat on Gibson's bed, he used a roll of toilet paper to try to stop the bleeding. At the time these events

were alleged to occur Kranzelic was recovering from foot surgery and had been given several doses of morphine.

At trial the state introduced evidence showing that the murder victim had blood type "O." Justice had blood type "AB." It was further shown that the blood stains found on the murder weapon, on Gibson's bed where Justice had sat, and on the roll of toilet paper, which was also recovered, all were of blood type "AB."

The trial lasted from December 1972 until April 1973. The jury deliberated for two and a half days before returning a guilty verdict on April 18, 1973. A month later, on May 17, 1973, Gibson and Justice made a motion for a new trial on the grounds that the jury had impermissibly relied upon evidence not produced in court. Affidavits submitted by the jurors reveal two incidents of misconduct.

At one point during the deliberations, Juror Colin Grist went to an encyclopedia to confirm his belief that blood type "AB" was rare. He reported his findings back to other members of the jury. Jurors Chapman, Gauger and Cox remembered some comment by Grist. Grist was unsure whether he made the comment before or after the balloting on Justice.

Another juror, Mona Gauger, stated that while the jury was considering Kranzelic's testimony she had commented on the dosage of morphine. Other jurors were unsure what effect the morphine may have had on Kranzelic, which Gauger interpreted as a request for more information. She then consulted a medical encyclopedia from which she apparently concluded that the morphine dosage was too small to have affected Kranzelic's perceptions. At least eight other jurors remembered some comment by Gauger, but there was some disagreement as to exactly what she had said.

In both cases there were apparently some comments in the jury room to the effect that the jury should not consider this evidence.

The trial judge denied the motion for a new trial. In his oral ruling the judge considered the applicable test to be that of People v. Watson, 299 P.2d 243, 254 (Cal. 1956), cert. denied 355 U.S. 846 (1957), which, in the courts of California, requires reversal for an error when it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (Emphasis added.) The judge specifically declined to apply the stricter test of Chapman v. California, 386 U.S. 18, 24 (1967), which requires, in the case of federal constitutional errors, that the error be harmless "beyond a reasonable doubt."

In his ruling, the judge twice indicated that were he to apply the Chapman standard, he would have granted the motion:

> I will state for the record that I cannot say that it [the jury misconduct] was harmless beyond a reasonable doubt.
>
> . . . .
>
> . . . . I don't think the Chapman case applies to this situation. If it does and I were to apply it, I would feel, I think, compelled to reach a different result.

The trial judge's decision was affirmed by an unpublished opinion of the California Court of Appeal. Petitions for certiorari to the California Supreme Court and the United States Supreme Court were denied. In denying the petitioners' subsequent writ of habeas corpus, the federal district court judge did not specifically decide whether the jury misconduct in this case amounted to constitutional error, but concluded that if there were constitutional error it was harmless beyond a reasonable doubt.

REASONS WHY THE WRIT SHOULD BE DENIED

The Decision of the Court of Appeals Must Be Upheld Because it Expressly Conforms to the Recent Mandate of This Court Requiring Deference to the Factual Determinations Made by State Courts.

Petitioners complain that the decision of the Court of Appeals granting habeas corpus relief is not merely erroneous but "tragic," and impliedly suggest that the decision is contrary to the dictates of this Court. It is clear, however, that the decision is neither erroneous nor tragic, but is virtually compelled under the law.

The record of respondents' trial discloses two instances of clear misconduct by the trial jury in obtaining extrinsic evidence during deliberations. None of the five courts who have considered the matter have questioned that this was error, nor have petitioners contended otherwise in the habeas corpus proceedings in the District Court or the Court of Appeals.

Rather, the issue around which the resolution of the instant case has revolved from the outset has been the proper legal standard by which the prejudicial impact of the error is to be measured and the application of that standard to the record below. The confusion in the record upon which petitioners now seek to capitalize is the product of the inconsistency in the positions they have taken on these issues before the courts which have previously considered the instant case.

In the state trial court, the prosecution opposed the motion for new trial made by defendants Gibson and Justice (respondents herein) on the grounds of jury misconduct by contending that the misconduct was to be judged by the "miscarriage of justice" standard of People v. Watson, supra, appropriate to non-constitutional errors. The trial judge accepted the prosecution's contention, and denied the motion for new trial under this standard, concluding that it was not "reasonably probable" that a

different verdict would have resulted had the errors not been committed. However, the state trial judge, who had presided over the lengthy trial for more than four months, observing the witnesses and their demeanor and watching the evidence unfold before him rather than merely reading it in a cold record, twice made clear for the record that his ruling was contingent upon the correctness of the determination that the error was not one of constitutional dimension. As noted above, he made and reiterated the factual determination that the error could not be found harmless beyond a reasonable doubt if that standard were to be applied to the evidence

The convictions, and consequently the denial of the motion for new trial, were appealed to the state Court of Appeal, which affirmed, and review was sought before the state Supreme Court, which denied a hearing. These rulings upholding the trial court's determination were also expressly based on the determination that the error complained of was not constitutional, and did not require the application of the "harmless error" rule enunciated in Chapman v. California, supra. (Petition, Appendix C, p. 86) Indeed, the extensive discussion of the issue by the state Court of Appeal (Id. at 67-88) in itself makes clear that the Court of Appeal considered the resolution of this question as dispositive of the issue, and thus by clear implication concurred in the opinion of the trial judge that the errors could not be found harmless under the federal consitutional standard. Nothing in the proceedings resulting in the denial of a hearing by the state Supreme Court suggests any alternative view of the record therein.

Thereafter, upon respondents Gibson and Justice's petition for habeas corpus in the United States District Court, the prosecution (represented by Petitioners herein) virtually abandoned any serious contention that the error was not of constitutional dimension. Rather, the United States District Court was urged to make an "independent review" of the massive trial record

and to determine, for the first time, that the conceded instances of jury misconduct were harmless beyond a reasonable doubt. Despite the explicit findings of the state trial judge, the United States District Court purported to make such a review and to declare the errors harmless.

Thus, in contrast to petitioners' attempted reconstruction of the procedural history of the matter (Petition, pp. 32-33), all but one of the courts who have expressed an opinion on the matter have concluded, as urged by respondents and decided by the Ninth Circuit Court of Appeals, that the proven jury misconduct could not be found harmless beyond a reasonable doubt under the Chapman standard. These courts have differed only on the purely legal question of whether the Chapman test was necessarily to be applied. Only one court that has considered the matter, and only one judge, has purported to make a contrary factual finding, and has attempted to characterize the error as constitutionally harmless. But in so doing the District Court acted contrary to the teachings of this Court in attempting to substitute its factual determination for that made by the state courts. Cf., Sumner v. Mata (1981) 66 L.Ed. 2d ___, 49 U.S.L.W. 4133.

In their petition, as before the Court of Appeals, petitioners concede the principal question of law, and do not dispute that the jury misconduct must be considered federal constitutional error. (Petition, pp. 33-34) This concession is entirely appropriate. As set forth by the Court of Appeals, the recognition that the jury misconduct resulted in violation of the constitutional right to confront and cross-examine witnesses is compelled by the decisions in, inter alia, Turner v. Louisiana (1965) 379 U.S. 466; Parker v. Gladden (1966) 385 U.S. 363; and United States v. Vasquez (9th Cir., 1979) 597 F.2d 192.

Rather than presenting a substantial question of law, petitioners thus ask this Court to review what is essentially a

purely factual determination. This request for review must be denied for three reasons.

First, it is well settled that this Court does not ordinarily "grant a certiorari to review evidence and discuss specific facts." United States v. Johnston (1925) 268 U.S. 220, 227. In the absence of an obvious and exceptional error in the apprehension or application of the standard involved, this Court will not, and should not intervene. See, e.g., Graver Manufacturing Company v. Linde Company (1949) 336 U.S. 271, 275; Mobil Oil Corp. v. F.P.C. (1974) 417 U.S. 283, 310. Such circumstances are not presented by the instant record in which there is no dispute as to the standard to be applied, and all but one of the several courts which have considered the factual issue have made the same determination as that presently challenged by petitioners.

Second, contrary to petitioners' attempted characterization, the Court of Appeals decision is entirely consistent with the principles of federalism and sound administration of justice recently articulated by this Court in Sumner v. Mata, supra. That decision requires not blind adherence to the results reached by state courts regardless of their merits, but a substantial deference to factual determinations made by state courts upon evidence presented therein. Thus, federal courts retain a strong mandate to ensure the correct understanding and application of principles of constitutional law in the state courts, but may not substitute their assessment of the facts for that of the state court in applying the proper standards. The Court of Appeals herein performed its mandated function, and no more.

As presented to the Court of Appeals, there was no dispute that the state trial court and reviewing courts had applied the wrong constitutional standard, and that is again conceded here. This concession having been made, the Court of Appeals reached the decision which would now be mandated under

Sumner v. Mata, supra, and upheld the factual determination of the state courts that the error could not be viewed as harmless. It is difficult to understand the basis upon which petitioners now urge that the Court of Appeals should have done otherwise.

Third, and perhaps most importantly, the factual determination reflected in the Court of Appeals' opinion should not be disturbed because it is plainly correct. In the instant case, unlike the situation addressed in Harrington v. California (1969) 395 U.S. 250, 254, there is no need to speculate upon "the probable impact of the [error] on the minds of an average jury." Here the jury itself has answered that question by undertaking the very actions which respondents challenge. Whatever might be the purported result of an "independent" review of the record, the undisputed fact that several members of the jury which convicted respondents felt it necessary to take the extraordinary step of obtaining extrinsic evidence on significant factual issues prior to returning a verdict leaves no room for serious argument, let alone certainty beyond a reasonable doubt, that the impropriety may have affected the verdict. The constitutional infirmity of respondents' convictions is thus plainly established.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

DATED: March 3, 1981

Respectfully submitted,

COLEEN BUTLER
MARVIN STENDER
GARRY, DREYFUS, McTERNAN, BROTSKY, STENDER, HERNDON & WALSH, INC.

Attorneys for Lawrence Justice

DORON WEINBERG
LARSON AND WEINBERG

Attorneys for Earl B. Gibson

By _____
DORON WEINBERG

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 80-1339

THOMAS L. CLANON, Superintendant,	)
	)
Petitioner,	)
	)
vs.	)
	)
EARL G. GIBSON,	)
	)
Respondent.	)
	)
GEORGE SUMNER, Superintendent,	)
	)
Petitioner,	)
	)
vs.	)
	)
LAWRENCE JUSTICE,	)
	)
Respondent.	)

CERTIFICATE OF SERVICE BY MAIL

DORON WEINBERG, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 396 Hayes Street, Suite 2 in the City and County of San Francisco, State of California; that on March 5, 1981, he served a true copy of attached Respondent's Brief in Opposition to Petition for Writ of Certiorari on each of the following, by placing same in envelopes addressed respectively as follows:

George M. Deukmejian
California Attorney General
6000 State Building
San Francisco, CA 94102

Clerk, U.S. District of Northern California
U.S. Courthouse
P.O. Box 36060
San Francisco, CA 94102

Clerk, U.S. Court of Appeals of the Ninth Circuit
P.O. Box 547
Seventh & Mission Streets
San Francisco, CA 94101

Colleen E. Butler, Esq.
Marvin Stender, Esq.
GARRY, DREYFUS, McTERNAN, BROTSKY,
STENDER, HERNDON & WALSH, INC.
1256 Market Street at Civic Center
San Francisco, CA 94102

Jerry Herman, DISTRICT ATTORNEY
Joshua Thomas, ASSISTANT DISTRICT ATTORNEY
Marin County Civic Center
San Rafael, CA 94903

Said envelopes were then sealed and deposited in the United States Mail at San Francisco, California with the postage thereon fully prepaid.

DORON WEINBERG

RECEIVED
MAR 6 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 80-1339

THOMAS L. CLANON, Superintendent,
Petitioner,
vs.
EARL B. GIBSON,
Respondent.

GEORGE SUMNER, Superintendent,
Petitioner,
vs.
LAWRENCE JUSTICE,
Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondents, Earl B. Gibson and Lawrence Justice, by and through their counsel, ask leave to file the attached Respondents' Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of California without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The affidavits of Respondents in support of this motion is attached hereto.

March 2, 1981

DORON WEINBERG
Counsel for Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1339

THOMAS L. CLANON, Petitoner,

vs.

EARL B. GIBSON, Respondent.

GEORGE SUMNER, Petitoner,

vs.

LAWRENCE JUSTICE, Respondent.

AFFIDAVIT

I, EARL B. GIBSON, being first duly sworn according to the law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: 1. I am the respondent in the above-entitled case. 2. Because of my poverty I am unable to pay the costs of said cause. 3. I am unable to give security for the same. 4. I believe that I am entitled to the redress I seek in said case. 5. The nature of said cause is briefly stated as follows:

On June 22, 1973, I was sentenced to life imprisonment for first degree murder in the Superior Court of California, County of Marin. A petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 challenging that conviction was subsequently filed in the United States District Court for the Northern District of California. That petition was granted on appeal by the United States Court of Appeals for the Ninth Circuit on the ground that two instances of jury misconduct violated my constitutional right

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to confront and cross-examine the witnesses against me.

Earl B Gibson
EARL B. GIBSON

Duly witnessed and sworn to before me,
a Notary Public, this 5th day of March 1981

Karen Jo Koonan
Notary Public

OFFICIAL SEAL
KAREN JO KOONAN
NOTARY PUBLIC-CALIFORNIA
City and County of SAN FRANCISCO
My Commission Expires June 22, 1984

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-1339

THOMAS L. CLANON, Petitioner,

vs.

EARL B. GIBSON, Respondent.

GEORGE SUMNER, Petitioner,

vs.

LAWRENCE JUSTICE, Respondent.

AFFIDAVIT

I, DORON WEINBERG, being first duly sworn according to law depose and say, in support of respondents' motion for leave to proceed without being required to prepay costs or fees:

I am the attorney for respondent Earl B. Gibson, and have prepared the instant opposition to the petition for writ of certiorari on behalf of respondent Gibson, and also respondent Lawrence Justice. Respondent Justice is presently incarcerated in a county other than that in which I maintain my law offices, and on that basis I make the instant declaration in his behalf.

Respondent Lawrence Justice is presently incarcerated in the County Jail of Marin County, California, having been transferred thereto directly from the custody of the California Department of Corrections, in whose custody he has been held without interruption for more than ten years. As a result, Mr. Justice is without funds to prepay costs or fees in the instant matter, or to give security for the same. Both respondent Justice and respondent Gibson have

been found indigent by the Superior Court of Marin County, and have been assigned court-appointed counsel. They are represented in the instant proceedings on a pro bono basis, in recognition of the fact that they are without financial means.

I believe that the decision rendered by the United States Court of Appeals for the Ninth Circuit granting the petition for writ of habeas corpus herein was correct, and that respondents are accordingly entitled to the redress they seek. The nature of the proceedings is set forth in the accompanying affidavit of respondent Gibson.

I believe that the foregoing statements are true and correct, except as to those matters stated on information and belief, and as to those matters, I believe them to be true.

DORON WEINBERG

Duly witnessed and sworn to before me,
a Notary Public, this 2nd day of March, 1981.

Notary Public

OFFICIAL SEAL
KAREN JO KOONAN
NOTARY PUBLIC-CALIFORNIA
City and County of SAN FRANCISCO
My Commission Expires June 22, 1984